SUPREME COURT U. S.

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FILED
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IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART, and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

ADDENDUM TO BRIEFS OF PETITIONER

Opinion of the Supreme Court of Wisconsin, Filed January 9, 1962, in *State ex rel.* v. *Board of Review*, 112 N. W. 914

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No. 128

AUGUST TERM, 1961

STATE OF WISCONSIN — IN SUPREME COURT

STATE *ex rel.* H. A. MORTON CO., a Wisconsin corporation,
Respondent,

v.

BOARD OF REVIEW, CITY OF MILWAUKEE, *et al.*,
Appellants.

APPEAL from a judgment of the circuit court for Milwaukee county: LEO B. HANLEY, Circuit Judge. *Modified and, as so modified, affirmed.*

Writ of certiorari directed to the Board of Review, City of Milwaukee, *et al.*, challenging an assessment by the city of Milwaukee of personal property tax upon respondent's imported wines and liquors. The H. A. Morton Company is a wholesale liquor dealer owning a warehouse in Milwaukee. It has a federal import license which enables it to import merchandise directly from foreign countries. The company is the exclusive importer and representative in the area for the Twenty-One Brands Company of New York City. Twenty-One Brands Company is the agent for various foreign wine and liquor manufacturers.

Within the warehouse is a metal caged area designated as a "United States Government Bonded Warehouse," established according to federal law. This inclosure is used solely for the storage of the wines and liquors respondent imports on which no duty has been paid.

The Morton Company obtains foreign wines and liquors, hereinafter called liquors, in two ways: One, it purchases direct from Twenty-One Brands in New York City which imports and sells merchandise from its own warehouse. These cases bear the importing license number of Twenty-One Brands. Two, it places an order with Twenty-One Brands which then sends the order to the distiller, who ships the order directly to respondent. At respondent's request the distiller places Wisconsin alcohol tax stamps on the bottles before the cases are closed. Respondent pays Twenty-One Brands for the order and the stamps. Respondent carries the insurance from the time the liquor is placed in the ship. Its importing license number is on the cases.

When the directly-imported liquor arrives in Milwaukee the Morton Company pays no import duty. Under the supervision of customs officials, who retain the key, the liquor is placed in the bonded caged portion of the warehouse. Upon notice to the customs office and payment of duties on any number of cases, a customs official is sent to the warehouse. He allows the cases to be removed from the caged area. There is no restriction as to the number of calls or the amount of merchandise which can be withdrawn from the cage when the duty is paid. Respondent pays the federal government for the time spent by the customs official.

The imported merchandise is stocked separately from the domestic merchandise in the open portion of the warehouse. At the close of business on April 30, 1959, there was $31,862.50 worth of liquor imported by respondent in the caged area on which no duties had been paid. In the open warehouse there was $24,460.66 worth of imported liquor consisting of broken cases imported by respondent in which some bottles had been removed; unopened cases imported by respondent and moved from the caged area after payment of duties; and open and unopened cases purchased from the Twenty-One Brands Company.

The city levied personal property taxes against all of the imported liquors. The Board of Review sustained the assessment and respondent filed a petition for writ of certiorari. The circuit court held for respondent, ruling that the assessment on the liquor still in the original package, unconsigned and unsold, violated the import-export clause of the United States constitution.

Judgment was entered on March 22, 1961, declaring the assessment to be null and void, and the defendants appealed.

Broadfoot, C. J. The issue here is whether merchandise imported for sale and kept on hand by the importer-wholesaler to meet current or anticipated business demand is protected by art. I, sec. 10, clause 2 of the United States constitution from the ad valorem personal property tax.

In *United States Plywood Corp.* v. *Algoma*, 2 Wis. 2d 567, 87 N. W. 2d 481, 358 U. S. 534, 79 S. Ct. 383, 3 L. Ed. 2nd 490, the United States supreme court affirmed the deci-

sion of this court and held that materials imported for use in manufacturing and stockpiled to supply the manufacturer's current operating needs were so taxable. The high court determined that the manufacturer had so acted upon the imported materials as to cause them to lose their distinctive character as imports by irrevocably committing them to use in manufacturing, the purpose for which they were imported.

The appellants here urge that the principles set forth in the *United States Plywood Corp. Case, supra,* be applied to the facts in this case. They contend that the following questions embrace the crux of that decision and that all four must be answered in the affirmative here:

1. Has the importation journey definitely ended?

2. Are the goods imported necessarily required to be kept on hand to meet the current needs?

3. Are the goods actually being used to supply the need?

4. Are indiscriminate portions of the whole actually being used to supply the daily operating needs?

It is not necessary to consider these contentions because the United States supreme court has to the present recognized, as must we, a distinction between goods imported for sale and goods imported for use in manufacturing. Beginning with *Brown* v. *Maryland*, 12 Wheat. 419, 25 U. S. 419, 6 L. Ed 678, that court has held that the import-export clause of the constitution protects goods imported for sale while they are in their original packages and have not been sold or used by the importer. "Use" by the importer of

such goods does not include their storage preparatory to sale. Storage does not cause the goods to lose their character as imports. This is true even if the goods, such as the liquor here, will only be sold for delivery in Wisconsin.

In the *United States Plywood Corp. Case, supra,* the United States supreme court modified the "original package" doctrine of the *Brown Case, supra,* as to unopened stocks of goods imported for use in manufacturing. However, it clearly indicated that it was not abolishing the "original package" doctrine as applied to unopened stocks of goods imported for sale:

> "Whatever may be the significance of retaining in the 'original package' goods that have been imported for sale (cases cited), goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.' " (358 U. S. 548, 79 S. Ct. 391).

It may be argued that an ad valorem property tax should be allowed because the tax is not directed towards imports as such and consequently the goods imported are not subjected to any burden as a class. Rather, the imported goods are subjected equally with other domestic property in the state to the tax. This argument was answered in *Low* v. *Austin,* 13 Wall. 29, 80 U. S. 29, 34, 20 L. Ed. 517:

> "* * * But the obvious answer to this position is found in the fact * * * that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they

> have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion."

It is suggested by appellants that the Twenty-first amendment to the United States constitution permits taxation in this case. The argument is made that since that amendment has given the state control over importation of liquor for use and sale solely within the state, the state can tax the liquor. This ignores the fact that under the authorities cited above the protection afforded imported liquor here has not ceased. The liquors are still imports and are protected by the import-export clause. The Twenty-first amendment is not inconsistent with the import-export clause and does not repeal it in so far as intoxicating liquors are concerned. *Parrott & Co.* v. *City and County of San Francisco,* 131 Cal. App. 2d 332, 280 Pac. 2d 881.

It is our determination that: (1) The liquor imported directly by the Morton Company, whether inside or outside of the bonded warehouse area, not sold or consigned, and still in the original, unopened cases or containers, can not be taxed; (2) the liquor imported by the Morton Company is taxable if the original cases or containers in which it arrived have been opened even though it had not been sold

or consigned; (3) the liquor imported by Twenty-One Brands and sold to the Morton Company is subject to the tax.

Some of the merchandise was improperly assessed. This requires that the entire assessment be set aside. That properly taxable may be reassessed by the proper authorities of the city of Milwaukee as omitted property. See *Central Cheese Co.* v. *Marshfield*, 13 Wis. 2d 524, 109 N. W. 2d 75. The judgment declared that the entire challenged assessment was null and void. The record does not support that statement.

Judgment modified to conform to the opinion and, as modified, it is affirmed. Gordon, J., not participating.